FILED
SEP 20 1955
HAROLD B. WILLEY, Clerk

No. 408

In the Supreme Court of the United States

_____ Term, 19____

THE SEMINOLE NATION, - - - - - - - - *Petitioner,*

vs.

NELLY WHITE; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; FORBES RHOADES OIL COMPANY; AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

W. F. Semmes,
Atlas Life Building,
Tulsa, Oklahoma,

Attorney for Seminole Nation, Petitioner.

Charles E. Grounds,
E. Keith Cooper,
Seminole, Oklahoma,

Of Counsel for Petitioner.

INDEX.

PAGE

Opinion below 1
Jurisdiction 2
Questions presented 2
Treaties and Federal Statutes involved 2
Statement of the case 5
Reasons for granting the writ 6
Appendix 11

TABLE OF CASES.

Choate v. Trapp, 224 U. S. 665 ..... 2, 8
Creek Nation v. United States, 318 U. S. 629, 63 S. Ct. 784, 87 L. ed. 1046 ..... 2, 5
Davidson v. Board of Administrators of New Orleans, 96 U. S. 97 9
Great Northern Ry. v. United States, 315 U. S. 262 .... 7, 9
Missouri-Pacific Ry. v. Nebraska, 164 U. S. 404 9
Seminole Nation v. Nelly White, et al., U. S. Court of Apps., 10th Cir., No. 4986, appendix herein, page .. 11
Shulthis v. McDougal, 170 Fed. 529 9
Tiger v. Western Investment Co., 221 U. S. 286 ..... 7, 9
United States v. Creek Nation, 295 U. S. 103 .....2, 5, 8, 9
United States v. Magnolia Petroleum Co., 110 F. 2d 212. 9

ACTS AND STATUTES.

Act of Congress of February 18, 1888, 25 Stat. 35 3
Act of April 26, 1906, Sec. 14, 34 Stat. 137 .....4, 6, 9
Act of August 4, 1947, Sec. 11 7
U. S. C. A., Title 28, Sec. 1254 2

TREATIES.

Seminole Treaty of March 21, 1866, 14 Stat. 755 2
Seminole Agreement of 1897, 30 Stat. 567 ..... 3, 4

IN THE SUPREME COURT OF THE UNITED STATES.

_____ Term, 19_____

No. _____

THE SEMINOLE NATION, - - - - - - - - *Petitioner,*

vs.

NELLY WHITE; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; FORDEE RHOADES OIL COMPANY; AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on the 25th day of May, 1955.

Opinion Below.

The findings of fact and conclusions of law of the trial court are embodied in the transcript (R. 31).

The opinion of the Court of Appeals (not yet officially reported) is also set out in the transcript of that court at page 3. For copy see Appendix, hereto attached.

Jurisdiction.

Jurisdiction is invoked under Title 28 U. S. C. A., Sec. 1254.

Mr. Justice CLARK, on August 28, extended time to file petition for certiorari to and including September 21, 1955.

Jurisdiction of Trial Court: *Creek Nation* v. *United States,* 318 U. S. 629, 63 S. Ct. 784, 87 L. ed. 1046.

Questions Presented.

1. Whether the respondent Nelly White as a Seminole allottee acquired title by virtue of her allotment patents to 9.47 acres of land occupied as right of way by Rock Island Railroad.

2. Whether an Act of Congress (April 26, 1906, 34 Stat. 137) could, without violating the due process clauses, divest the Seminole Nation of title to 9.47 acres of land and vest title thereto in an allottee having adjoining lands.

3. Whether the ruling of the Court of Appeals conflicts with *Choate* v. *Trapp,* 224 U. S. 665, upholding treaty provisions as vested rights as against subsequent acts of Congress, and *United States* v. *Creek Nation,* 295 U. S. 103, holding the Congress to be without power to give away Creek tribal lands.

Treaties and Federal Statutes Involved.

1. Seminole Treaty of March 21, 1866, 14 Stat. 755, reads in part as follows:

> "The Seminole Nation hereby grant a right of way through their lands to any company which shall be duly authorized by Congress, and shall with the express consent and approbation of the Secretary of the Inte-

rior, undertake to construct a railroad from any point on their Eastern to their Western or Southern boundary * * *."

2. Act of Congress of February 18, 1888, 25 Stat. 35 (creating Choctaw, Oklahoma and Gulf Railway), reads in part as follows:

> "That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line * * *."

3. Seminole Agreement of 1897, 30 Stat. 567, reads in part as follows:

> "All lands belonging to the Seminole Tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall become citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him."

4. Another provision of the Seminole Agreement of 1897, 30 Stat. 567, as follows:

> "And the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes."

5. Section 14 of Act of April 26, 1906, 34 Stat. 137, in part as follows:

> "That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations reserved from allotment or sale under any act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation, or organization entitled thereto: Provided, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof; Provided further, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards, or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality."

Statement of Case.

The controversy is over the ownership of 9.47 acres of land occupied as right of way by the Rock Island Railroad. Petitioner claims it is owner of the land, subject to easement rights of the Chicago, Rock Island and Pacific Railroad Company (herein called Rock Island) for right of way, contending that the land was never allotted but was reserved from allotment. While the trial court found as a matter of fact that respondent Nelly White received other land to compensate her for the right of way acreage, it was held as a matter of law that title to the land was vested by virtue of allotment in Nelly White, as a Seminole allottee, having lands allotted to her on both sides of the right of way acreage (R. 32, 33). The trial court and Court of Appeals ruled as a matter of law that Nelly White acquired title by allotment and by virtue of Sec. 14 of the Act of 1906, *supra*.

Petitioner is one of the Five Civilized Tribes group of Indians whose domains were located in what was formerly the Indian Territory, now Oklahoma. While its common domain has been allotted in severalty, it still retains some tribal lands and properties and is in existence as a legal entity. *Creek Nation* v. *United States,* 318 U. S. 629. It had a fee simple title to lands, not the usual right of occupancy. *United States* v. *Creek Nation,* 295 U. S. 103.

The homestead patent to the allottee shows she was allotted land in Lot 1, "less 3.30 acres occupied as right of way by the Chicago, Oklahoma and Gulf Railroad" (afterwards Rock Island). (R. 8) Another patent as to land in the SE4 of NE4 reads, "less 3.09 acres occupied as right of way" (R. 10), and describes another tract in Section 1, "less 3.08 acres occupied as right of way." (R. 10)

The Rock Island Railroad is successor of the Choctaw, Oklahoma and Gulf Railroad (R. 47), the original grantee of the right of way. It, or its predecessor, has been in continuous existence since 1888 (R. 46).

Under Sec. 14 of the Act of April 26, 1906, 34 Stat. 137, *supra*, the railroads were given an option to acquire fee title to the lands occupied as rights of way through allotments made to members of the Five Civilized Tribes. Neither the Rock Island Railroad nor any of the other railroads elected to acquire the fee title, although the time to exercise the option to purchase was extended by the Secretary to June 30, 1909 (R. 32).

The United States intervened, and the United States Attorney asserted that title was vested in Nelly White, as an allottee and by virtue of Section 14 of the Act of 1906, *supra*. From an adverse judgment petitioner appealed, and the Court of Appeals affirmed.

Reasons for Granting the Writ.

1. A Federal question, not heretofore passed upon but which should be decided by this Court, involves all of the Five Civilized Tribes. The allottee here received by patents her full share of the tribal lands of the Seminoles, exclusive of the land occupied by the railroad. She applied for and received additional land to compensate her for the acreage occupied as right of way. The trial court so found. (R. 32)

Her patents, for example, read, "less 3.30 acres occupied as right of way by Choctaw, Oklahoma and Gulf Railroad * * *" (now Rock Island). (R. 31) Thus she got no title by patent.

Moreover, Sec. 14 of the 1906 Act is a congressional in-

terpretation that the lands of the Seminoles, occupied as right of way by railroads, were not allotted lands but were reserved as common lands of the tribe, to be disposed of as such. Congressional interpretations of prior acts are entitled to weight. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Great Northern Ry.* v. *United States,* 315 U. S. 262.

2. An important Federal question, not heretofore decided by this Court but which should be passed upon, involves the administrative functions of the United States Indian Superintendent (Area Director) of the Five Civilized Tribes in the matter of the leasing and collecting of bonus money and rentals on restricted Indian lands in the Five Civilized Tribes for oil and gas mining purposes, in that if the lands occupied as rights of way are owned by the Seminole tribe, or any one of the other Five Civilized Tribes, the acreage composing the right of way should be excluded from the leases made by restricted Indian allottees, and bonus income and delay rental moneys should be calculated accordingly; but if owned by allottees, or allottees on both sides of the right of way, the acreage composing the right of way should be apportioned or credited to the respective land owners as their interests would appear.

3. An important Federal question, not heretofore passed upon by this Court but which arises in the matter of the application of the Act of August 4, 1947,[1] to the unitization of acreage in areas in the Five Civilized Tribes where restricted Indian lands have been leased for oil and gas by administrative officials of the Department of the Interior.

1. Sec. 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: *Provided,* That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

If the tribe owns the land constituting the right of way, that part of the acreage in any drilling unit should be credited to the Indian tribe involved; if owned by a restricted allottee or a separate allottee—one on one side of the railroad and one on the other—the acreage is to be allocated to the allottee or allottees, as the ownership of land adjoining the railroad warrants.

4. Another important Federal question is presented to Federal and State agencies having charge of the matter of collecting income taxes from lands where the land is traversed by railroads, in that if allottees are to be credited with this additional acreage, the income should be handled and taxes collected in accordance with such additional acreage attributable to the original allotment. An area of 9.47 acres is a substantial accretion to this allotment.

5. It is believed that the Court may take judicial notice of common practice throughout oil fields of directional drilling where surface conditions constitute obstacles. Attorneys representing oil companies and producers decline to approve title to leases upon areas in the Five Civilized Tribes occupied by railroads. A decision by this Court would set that question at rest and open the way for development of these areas. Frequently requests are made for quit claims or leases from the tribe involved.

6. It is believed that the opinion of the Court of Appeals conflicts with the rule announced in *Choate* v. *Trapp*, 224 U. S. 665.[2] and *United States* v. *Creek Nation*, 295 U. S. 103.[3]

2. There it was said: "It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute."

3. After stating that the Congress had plenary powers, it was said: "It did not enable the United States to give the tribal lands to others or to appropriate them to its own purpose, without rendering, or assuming an obligation to render, just compensation for them."

If it be held that Nelly White acquired no title by her patents, she could then only have title by virtue of the Act of 1906, *supra*. To have title under that act, it would be in fact a gift, violative of the terms of the Seminole Agreement which provided (*1*) for an equal partition of lands, and (*2*) that upon the acceptance of a patent an allottee relinquished interest in all other lands of the tribe. Having received her full quota of allottable lands, as the trial court found (R. 32), she could only get title as a gift under the Act of 1906. It has been held in many cases that the private property of one person or group of persons cannot be taken by legislative enactment and given to another.[4] The Seminole Nation, like the Creek Nation, owned title to its common properties in fee.[5] The allotment of its lands in severalty was in effect a partitioning of lands among tenants in common.[6] The Congress by the very terms of Section 14 of the Act of 1906, *supra*, recognizes that title to the acreage accupied by railroads was in the tribe, and provided for an appraisement and sale. A Congressional interpretation is intitled to weight in construing former acts and treaties.[7] If title had not been in the tribes but in Nelly White, there would have been nothing for the Secretary to sell for the Seminole Nation or the other nations.

The opinion of the court below is predicated upon the law announced previously by that court in *United States* v. *Magnolia Petroleum Co.*, 110 F. 2d 212, but we respectfully submit that such opinion has not been accepted by the bar as a final interpretation of the law applicable to the facts.

---

4. *Davidson* v. *Board of Administrators of New Orleans*, 96 U. S. 97; *Missouri-Pacific Ry.* v. *Nebraska*, 164 U. S. 404.

5. *United States* v. *Creek Nation*, 295 U. S. 103.

6. *Shulthis* v. *McDougal*, 170 Fed. 529.

7. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Great Northern Ry.* v. *United States*, 315 U. S. 262.

It would seem that that opinion in fact holds that the Congress by the Act of 1906 actually divested the nation of title and vested title in the adjoining land owner. That cannot be done without violating the rule applied in the *Creek* case, *supra*. It would seem that the Court could take judicial notice of the fact that in an area where oil and gas structures exist, a 9.47 acre tract would have large potential values. In fact, that would be almost the acreage of the ten acre drilling unit common in all oil fields.

Respectfully submitted,

W. F. Semple,
Atlas Life Building,
Tulsa, Oklahoma,

Attorney for Seminole Nation, Petitioner.

Charles E. Grounds,
E. Keith Cooper,
Seminole, Oklahoma,

Of Counsel for Petitioner.

APPENDIX.

Filed: United States Court of Appeals, Tenth Circuit, May 24, 1955. Robert B. Cartwright, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT.

May Term, 1955.

Number 4986.

THE SEMINOLE NATION, Appellant,

vs.

NELLY WHITE, CHICAGO, ROCK ISLAND and PACIFIC RAILROAD COMPANY and FORDEE RHOADES OIL COMPANY and UNITED STATES OF AMERICA, INTERVENER, Appellees.

Appeal from The United States District Court for the Eastern District of Oklahoma.

W. F. Semple for Appellant.

Edmund B. Clark (Perry W. Morton, Frank D. McSherry and Roger P. Marquis were with him on the brief) for The United States, Appellee.

Before, Huxman, Murrah and Pickett, Circuit Judges.

MURRAH, Circuit Judge.

This suit involves the title to a strip of land under the Chicago, Rock Island and Pacific Railroad Company's right-of-way in Seminole County, Oklahoma, formerly Seminole Indian Nation. The question is whether it belongs to the Seminole Tribe, which brought this suit in its quasi sovereign capacity to quiet its title, or to the Seminole Indian allottee of the adjoining and adjacent lands, who has since executed an oil and gas lease covering part of the allotment, to the appellee, Fordee Rhoades Oil Company. The trial

court held for the Indian allottee, and the Tribe has appealed.

The agreed facts found by the trial court show that Nelly White, a duly enrolled full-blood Seminole Indian, was allotted as her distributive share of the lands in the Seminole Nation: "Lot 1, less three and 30/100 (3.30) acres occupied as right-of-way by the Choctaw, Oklahoma and Gulf Railroad"; "The Southeast Quarter of the Northeast Quarter, less three and 9/100 (3.09) acres occupied as right-of-way" by the same Railroad; and "The Northeast Quarter of the Southeast Quarter, less three and 8/100 (3.08) acres, occupied as a right-of-way" by the same Railroad, all in Section 1, Township 8 North and Range 6 East. At the time of the trial, Nelly White was the owner of the described land, except the Northeast Quarter of the Southeast Quarter, which she had sold. On August 15, 1947, she executed a departmental oil and gas lease for a primary term of ten years in favor of the Fordee Rhoades Oil Company covering the described land, less the described acres for the railroad right-of-way. The Chicago, Rock Island and Pacific Railroad Company is the successor in interest of the Choctaw, Oklahoma and Gulf Railway, which, prior to the allotment, had constructed a railroad across the land. This railroad has been continuously operated to the present time.

In determining the acreage to which the allottee, Nelly White, was entitled as her distributive share of the tribal land, consideration was given to the land included in the railroad right-of-way, and additional acreage was allowed as compensation for it. And, the Tribe claims title to the described strip of land on the theory that it was never allotted to Nelly White, but was excepted from the original grant, and title thereto reserved in the Tribal Nation, subject only to the right-of-way.

Section 14 of the Act of April 26, 1906, 34 Stat. 142, provides that "the lands in the Choctaw, Chickasaw, Chero-

kee, Creek and Seminole nations reserved from allotment or sale under any Act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation, or organization entitled thereto: Provided, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof: Provided, Further, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right-of-way, depot, station grounds, water stations, stock yards or other uses * * * title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior * * * but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality." Concededly, these lands are not located within any municipality, and it is agreed that the Railroad did not make payments for the lands in question as provided in the Act. The trial court held that the Railroad acquired only a right-of-way across the lands, and it has not appealed.

The Tribe construes the language in the deed as expressly reserving the strip of land from the allotment, subject to the easement rights in the Railroad; and contends that if Section 14 of the 1906 Act is construed to vest title to the strip of land in the allottee, it takes the Tribe's property and gives it to the allottee without due process.

In support of its construction of the deed, the Tribe points to the fact that the Indian allottee was deeded other land in compensation for the acreage included in the rail-

road right-of-way, and says that this fact is indicative of the controlling intention to except the land involved from the allotment; that any other construction would operate to give the Indian allottee more than her distributive share of the tribal lands in violation of the spirit and purpose of the acts and treaties dissolving tribal government and allotting tribal lands in severalty of equal value to the members of the Tribe.

In holding that the title to the strip of land in question vested by allotment from the Seminole Nation in Nelly White subject only to the Railroad right-of-way, the trial court followed the unmistakable holding of this Court in *United States* v. *Magnolia Petroleum Co.*, 110 F. 2d 212, followed and affirmed in *United States* v. *Drumb*, 152 F. 2d 821, involving deeds to allotted lands containing identical words of reservation. After announcing the general rule that the servient estate in a strip of land set apart for a railroad right-of-way or other similar purposes passes with a conveyance of the fee to the abutting legal subdivision or tract out of which the strip or small area was carved, even in the absence of express provision to that effect, this court went on to say that Congress enacted Section 14 with that general rule in mind. With unmistakable clarity and lucidity, the court pointed out the "marked difference" in the statutory treatment of land reserved for institutional use and abandoned for such purpose prior to conveyance, and land reserved for right-of-way or other railroad purposes, as in the case there and here. The court construed the pertinent statute, particularly Section 14, as a plain grant of land reserved from the allotment for railroad purposes to the owner of the legal subdivision out of which it was taken where the railroad company has a right in the nature of an easement but fails to acquire legal title by payment as provided by the statute. The court thought the "marked difference" between lands reserved for institutional purposes—usually larger tracts—and small strips reserved for railroad right-of-way, would avoid the "plain evils which would arise from the retention in the tribe as

remote dedicator of a strip or other small tract reserved for right-of-way or other railroad use * * *. To say that on failure of a railroad company to make payment of a narrow strip reserved for a right-of-way or on its abandonment for such purpose, title rests in the tribe, would be inconsistent with the purpose and intent of the statute as a whole, would be out of harmony with the manifest purpose of Section 14, and would be at variance with the rule against retention of title in remote dedicators. It would be an interpretation not warranted by the language or history of the section."

The only suggested distinction between the *Magnolia* case and our case is that in the former case, the right-of-way had been abandoned. But, no valid reason is suggested for a different application of the Act to rights-of-way which have not been abandoned. The fact of abandonment was urged as a reason for the inapplicability of the Act in the *Magnolia* case. We regard the factual distinction as of no significance. In either case the title is to a small tract of land, and the question is whether the servient estate shall be vested in the owner of the adjoining and abutting land or a remote dedicator, and the general rule recognized and followed in the *Magnolia* case is equally applicable.

On the question of due process, it is sufficient to say that we construe the language of the deed from the Tribe as vesting title in the allottee under the general rules of construction quite apart from the incidence of Section 14. But, we have already affirmed the power of Congress "to make a disposal of these contingent reversionary interests in railroad rights-of-way * * *." And, in the exercise of that power, "the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race * * *" and "the propriety or justice of their action towards the Indians, with respect to their lands, is a question of governmental policy." *United States* v. *Drumb, supra,* p. 823.

The judgment is affirmed.